

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protest of)	
)	
Knowledge Connections, Inc.)	Docket No. 06-TSA-024
)	
Solicitation No. DTFAWA-HSCEAM-06-R-00014)	

DECISION ON REQUEST FOR SUSPENSION OF ACTIVITIES

I. INTRODUCTION

This matter arises from a protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on March 31, 2006 by Knowledge Connections, Inc. (“KCI”) involving Request for Proposals No. DTFAWA-HSCEAM-06-R-00014 (“RFP”). The RFP recently was issued by the Transportation Security Administration (“TSA”) for reservation support services to support the deployment of the Federal Air Marshal Service (“FAMS”) officials on United States air carriers—both domestically and internationally. *See TSA Opposition to Protester’s Request for Suspension (“TSA Opposition”)* at 1. KCI currently is providing these services pursuant to a contract that is scheduled to expire on May 31, 2006. In its Protest, KCI challenges terms of the RFP, and states a number of concerns that pertain to its incumbent performance of the required services. KCI has requested that the ODRA direct TSA to suspend the new acquisition for the duration of this Protest. *See Protest* at 2. For the reasons explained below, the ODRA denies the Protester’s request for a suspension.

II. BACKGROUND

A. The New Solicitation

According to the TSA, the services at issue in this Protest will support the Reservation Branch of the FAMS Systems Operation Control Division, which is considered to be the “direct link to the airline industry partners who, in accordance with legal precedent after September 11, 2001, provide the means for [the] deployment of mission status” FAMS officials. *TSA Opposition* at 1. Under the RFP, the successful awardee will be required to provide support services to the Reservation Branch on a twenty-four hour/seven day-per week basis with at least twenty-one full-time staff. *See RFP, Section C: Statement of Work*, ¶ 2.1 at C-2. In addition, the RFP requires all proposed personnel to have a minimum security clearance level of “secret” as well as a minimum of four years experience with either the Sabre or Apollo computer reservation system. *Id.*, ¶ 4.0, “*Personnel Requirements*,” at C-8 and C-9.

B. The Protest Filings

On March 17, 2006, KCI filed an agency-level protest at TSA which listed six grounds of Protest, along with thirty-five “questions and concerns” that were set forth in “*Attachment A*” to its agency-level protest. Shortly thereafter, on March 23, 2006, KCI filed this ODRA Protest which essentially is identical to its agency-level filing.¹ On April 3, 2006, TSA posted a copy of the thirty-five questions in “*Attachment A*” with corresponding answers on the “Federal Business Opportunities” website.²

¹ On April 13, 2006, TSA filed a Motion to Dismiss which alleges that KCI’s Protest fails to state a claim upon which relief may be granted, in contravention of the ODRA Bid Protest Regulations. *See* 14 C.F.R. § 17.19(a)(2). The ODRA will decide that Motion separately. In this regard, the Protester has been directed to submit a response to the Motion by April 26, 2006.

² The FedBizOpps.gov website is the “single government point-of-entry (GPE)” for Federal government procurement opportunities over \$25,000. *See* <http://www.FedBizOpps.gov>.

On April 6, 2006, TSA filed its Opposition to the suspension request. The following day, in accordance with its Procedural Regulations, the ODRA convened an initial Status Conference with the parties, *see* 14 C.F.R. §17.17(b), and scheduled filing deadlines for various pleadings. On April 11, 2006, the TSA received several proposals responding to the new solicitation, but no proposal was submitted by KCI.

III. THE PARTIES' POSITIONS

A. KCI Protest and Suspension Request

In its Protest, KCI first asserts that KCI is entitled to an equitable adjustment for TSA's hindering and failing to cooperate with KCI while it was the incumbent contractor for the reservation support services. *See KCI Protest*, ¶ 1(a) at 1. KCI also challenges the new solicitation's "procuring office quality assurance monitoring plan" because it unreasonably permits "no more than 5 errors" per month "on a job where thousands of transactions are processed" each month. *Id.*, ¶ 1(b) at 1. In addition, KCI asserts that the "inconsistencies" between the new solicitation's security clearance and minimum experience requirements will cause "legal contractor frustration" because personnel meeting these qualifications will not accept the low compensation specified in the solicitation's identified wage rates. *Id.*, ¶¶ 1(c) and (d), at 1.

KCI also protests that the required reservation support services are "being unnecessarily re-competed at taxpayers' expense" because the TSA is trying to avoid resolving "the issues" that have arisen during KCI's incumbent contract performance. *Id.*, ¶ 1(e) at 2. Citing the "need to work together," as well as various federal contracting policies that favor veteran-owned business concerns, the Protester reports that instead of proceeding with the new solicitation, the TSA "should work together with" KCI to "maximize the potential for" the required reservation support services to be performed by a qualifying veteran-owned business such as KCI "now and in the future." *Id.*, ¶¶ 1(e) and (f), at 2.

KCI's Protest also advised that the "Attachment A" which accompanied its ODRA filing contained "[o]ther questions and concerns that we have to date on this solicitation." *Id.*, ¶ 2. Finally—as indicated above—KCI's Protest requests that the new acquisition be

suspended “until [the parties] can try to resolve the issues . . . through alternative dispute resolution.” *Id.*

B. TSA’s Opposition to the Suspension Request

TSA opposes KCI’s suspension request on grounds that the Protester has failed to articulate a “compelling reason,” “adverse consequences,” or any other “facts in support of its position” that a suspension of the new acquisition is warranted. *TSA Opposition* at 3. According to TSA, “but for bald allegations,” the Protester has failed to make any evidentiary showing of any “possibility of irreparable harm during the pendency of this protest” to either KCI or the “public interest” that would “require suspension of the new solicitation.” *Id.*

In making this argument, TSA also emphasizes that if any stage of the new acquisition is suspended, such an interruption or delay will “imperil severely the Government’s ability to award and transition a contractor prior to the May 31, 2006 expiration” of KCI’s incumbent contract. *Id.*, ¶ II.B at 4. TSA reports that it “cannot continue” to have KCI perform these services under its incumbent contract because TSA has significantly revised the new solicitation by requiring all proposed personnel have minimum security clearance level of “secret,” as well as at least “four years experience in Sabre and/or Apollo computer reservation systems.” *Id.* at 4-5. According to TSA, these qualifications were established in response to the agency’s “realization” that the FAMS mission requires more “sensitivity with respect to the reservation duties,” and because this work routinely requires “access to classified materials.” *Id.*, ¶ I.A, at 1-2. Notably, the designated contracting officer for this requirement reports that the “government previously considered modifying” KCI’s incumbent contract to incorporate these two “changes” and “requested/received a proposal from the Protester based upon a revised statement of work primarily reflective of these changes.” *See TSA Opposition, Declaration of Nancy G. Bailey*, ¶ 6, at 1. In response, KCI submitted a proposal that was non-responsive to the two “changes” but which also sought a “significant increase to its [c]ontract prices’ because of the “significant nature” of the Sabre/Apollo “experience and SECRET clearances” changes. *Id.*

TSA also advises that granting KCI's request for a suspension of the new acquisition would "irreparably harm" the FAMS because any delays would force it to extend the Protester's current incumbent contract on a non-competitive basis, leaving the Reservations Branch without qualified personnel to perform the required services. *See TSA Opposition*, ¶ II.B at 4 "Without these revised requirements," TSA reports that "an undue burden is placed upon the FAMS from an operational, logistical, and security standpoint." *Id.*, *Declaration of John M. Muth*, ¶ 5 at 1. As a result, TSA urges the ODRA to deny KCI's suspension request because such a suspension would "serve to benefit only" KCI and would otherwise force the FAMS to "continue a contract which does not meet" the security clearance level and minimum computer reservation experience that are critical to the performance of the services and the support of the FAMS mission. *Id.*, ¶ II.B at 5.

C. KCI's Reply To TSA's Opposition

In its April 13, 2006 Reply to TSA's Opposition, KCI lists fourteen "reasons" why it "believes that the subject solicitation needs to be suspended." *Reply* at 1. Several of these items simply repeat or vaguely elaborate on the six allegations set forth in KCI's original Protest to the ODRA. For example, KCI continues to allege "unreasonable differences between the skill level required on the procurement and the labor category required for pricing," *see KCI Reply to TSA Opposition* ("KCI Reply"), ¶ 1 at 1, as demonstrating that these specifications are "arbitrary and capricious." *Id.*, ¶ 5 at 4. KCI also continues to request that TSA cancel the new solicitation and procure the required services from KCI via an option year extension to its incumbent contract. *Id.*, ¶ 9 at 4; ¶12 and ¶14 at 6. In addition, KCI repeats its original Protest assertion that the new "solicitation's standards and performance goals" remain "unclear," because TSA has not adequately described how TSA "intends to measure" or "monitor" the contract's "performance goals." *Id.*, ¶ 3 and ¶ 4 at 2.

KCI's filing also offers several new Protest allegations as "reasons" for granting its suspension request. First, KCI challenges the solicitation's failure to require the submission of a technical approach that describes how the "professional services

requirement” of the solicitation will be met. *Id.*, ¶ 2 at 1. In addition, KCI maintains that the new solicitation is improperly oriented towards “personal”—instead of “professional”—services, *Id.*, ¶ 3 at 3, and contends that “there is no reasonable justification for making this a Time and Materials Contract” instead of the “Fixed Price Labor Hour” type of contract that KCI is currently performing. *Id.*, ¶ 7 at 4. Finally, KCI alleges that the contents of the proposal it submitted during its earlier contract modification negotiations with the contracting officer may have been disclosed to its competitors *Id.*, ¶ 6 at 4.

KCI’s Reply also refers to several controversies that are currently pending before the ODRA pursuant to a separate Contract Dispute that KCI filed on March 17, 2006, arising out of its performance of the incumbent contract for the required reservation support services. In the Reply, KCI asserts that TSA improperly recruited and hired away several of its incumbent contract staff, which significantly impeded KCI’s performance of that contract. *Id.*, ¶ 8 at 5. KCI also reports that it is entitled to recover “damages for retaliation” by TSA during its incumbent contract performance, as well as payment from TSA to reimburse KCI for “constructive modificatio[ns]” that were required during its incumbent performance and which “exceeded \$1,237,785.60.” *See Id.*, ¶ 11 at 5 and 6.

IV. DISCUSSION

A. Standard of Review for the Suspension Request

The Acquisition Management System contains a strong presumption that contract-related activities will continue during the pendency of acquisition disputes. *See Protest of Informatica of America, Inc.*, 99-ODRA-00144, ODRA Decision on Stay Request, dated October 10, 1999, *citing Protest of J.A. Jones Management Services*, 99-ODRA-00140. Consistent with the AMS, the ODRA Procedural Rules provide that procurement activities, and, where applicable, contractor performance, shall generally continue during the pendency of a protest. *See* 14 C.F.R. § 13.17(g). However, pursuant to its Delegation of Authority from the TSA and 14 C.F.R. § 17.15(d) and 14 C.F.R. § 17.17(b), the ODRA may impose a suspension of an award or a delay of contract performance, in

whole or in part, where it determines there is a compelling reason. *See* 14 C.F.R. § 13.17(g). The Protester bears the burden of overcoming the presumption against the issuance of a stay, *see All Weather, Inc.*, 04-ODRA-00294. In deciding whether to recommend a suspension, the ODRA utilizes the four-part test employed by the United States Court of Appeals for the District of Columbia. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d. 841 (D.C. Cir. 1977); *Consolidated Contests of Agency Tender Official James H. Washington and Kate Breen, Agent For A Majority Of Directly Affected Employees*, 05-ODRA-00342C and 05-ODRA-00343C, Decision on Request for Suspension, dated April 12, 2005. To determine whether there is a compelling reason in support of a requested work suspension, the ODRA examines a combination of factors, on a case-by-case basis, including:

- (1) whether the protester made out a substantial case; (2) whether a stay or lack of a stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis.

See Protest of Crown Communication, 98-ODRA-00098, Decision on Request for Suspension, dated October 9, 1998; *Protest of J.A. Jones Management Services*, 99-ODRA-00104, Decision on Request for Suspension, dated September 29, 1999; *Protest of Glock, Inc.*, 03-TSA-003, Decision on Request for Suspension, dated October 28, 2003; *Protest of Mid Eastern Builders, Inc.*, 05-ODRA-00330, Order for Temporary Stay, dated January 28, 2005.³ In this regard, it is well established that the “substantial case” prong of this 4-part suspension inquiry and analysis is generally de-emphasized by the ODRA in favor of a “balancing of equities as revealed through an examination of the other three factors.” *See Washington Metropolitan Area Transit Commission, supra* at 843.

³ This approach follows the standard for injunctive relief under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the cases interpreting it. *See Crown Communication, supra* at 3, citing *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Here, the gravamen of KCI's request appears to be that suspension of the new acquisition is warranted simply because it has filed protest grounds at the ODRA which are currently awaiting resolution. The ODRA reaches this conclusion because except for referring to the fourteen allegations listed in its April 13, 2006 "Reply" as "reasons" which support its suspension request, none of KCI's Protest filings allege or offer any further details in support of this request..

B. Whether KCI Has Alleged A Substantial Case

In reviewing whether "compelling reasons" to recommend a stay exist, the ODRA does not prejudge whether a protester has a probability of success on the basis of initial pleadings since in a bid protest context, the stay issue will often be litigated before the agency report is filed. *See Decision on Crown's Request for Suspension of Contract Performance*, 98-ODRA-00098. The substantive allegations underlying a Protest—and whether those arguments demonstrate a "fair ground for litigation" or "deliberate investigation"—are relevant to the ODRA's evaluation of whether the Protester has made out a substantial case warranting a suspension, as required by the first prong of the 4-part suspension analysis. *See Protest of All Weather, Inc.*, 04-ODRA-00294 at 4. As explained below, many of the allegations presented by KCI are "nonprotestable" and are insufficient to establish the "substantial case" that is required before further analysis of KCI's suspension request can proceed. *See Crown Communication, Inc.*, 98-ODRA-00098.

Several of KCI's challenges present matters of post-award contract administration which the ODRA will not review in the context of a bid protest. *See Protest of Metro Monitoring Services, Inc.*, 97-ODRA-00047. For example, the ODRA will not consider KCI's Protest to the extent it challenges the TSA's failure to renew or modify its incumbent contract. This is because these allegations raise challenges that pertain solely to TSA's contract administration decisions on KCI's incumbent contract—which is completely separate from the new solicitation—and has almost been completely performed. In addition, these allegations are also not suitable for consideration as there is

absolutely no legal requirement for the TSA to pursue incumbent contract negotiations with KCI instead of proceeding with the current competitive procurement. *See Protest of Contract Services, Inc.*, ODR Docket No. 96-ODR-0007. KCI's allegations that the TSA has improperly hindered or failed to cooperate with its incumbent contract performance are similarly not reviewable by the ODR in a bid protest as they pertain solely to KCI's incumbent contract. In this regard, KCI's claims that it should receive preferential treatment because of its veteran-owned business status similarly fails to present a valid basis for Protest.

The ODR cannot consider several controversies identified in KCI's Protest because these matters are already pending before the ODR as part of an earlier Contract Dispute filed by KCI on March 17, 2007. *See Protest of Metro Monitoring Services, Inc.*, *supra*. Each of the following controversies raised by KCI in its Protest—contending that the TSA improperly impeded KCI's incumbent performance; asserting a claim for retaliation damages; and requesting reimbursement by TSA for certain incumbent contract costs that reportedly exceeded \$1 Million—involve contract disputes between KCI and TSA solely arising from KCI's incumbent contract performance. As they are unrelated to the new solicitation, and raise matters of pure contract administration, the ODR cannot further consider the allegations in the context of this Protest.

Finally, the ODR cannot credit KCI's contention that the TSA improperly disclosed the contents of KCI's incumbent contract modification proposal to KCI's competitors. KCI has not alleged or otherwise identified a solid basis for its reported suspicion. Rather, KCI only asserts that it "suspects" an improper disclosure because it does not believe that the "technical staff" were not advised to "not to discuss the contents" of KCI's proposal "with other vendors." *See Reply to TSA Opposition*, ¶ 6 at 3. In this regard, it is well established that a presumption of regularity and good faith attaches to the actions of

government officials, *see Protest of Computer Associates International, Inc.*, 00-ODRA-00173 (and cases cited therein), and actual evidence—not just unsubstantiated allegation—is required to support allegations of agency impropriety. *See Protest Raytheon Technical Services Company*, ODRA Docket O2-ODRA-00210.

To the extent that the remaining allegations set forth in KCI's Protest present challenges to several terms of the new solicitation, such allegations are the subject of the pending Motion to Dismiss, which will be decided separately. In any event, this first factor of the suspension analysis is de-emphasized in favor of a "balancing of equities as revealed through an examination of the other three factors." *Washington Metropolitan Area Transit Commission*, *supra* at 843.

C. Whether KCI Has Presented Compelling Reasons For A Stay

After examining the record to date and the parties arguments, the ODRA concludes that the Protester has not demonstrated any of the compelling circumstances that are required under the remaining three factors of the suspension analysis that govern the ODRA's consideration and decision on this suspension request. Specifically, the ODRA concludes that KCI has not demonstrated that irreparable injury will result if a suspension is not imposed during the adjudication of its Protest; nor does the ODRA find any evidence in this record to demonstrate that the relative hardships of the parties favor the imposition of a stay. Finally, the ODRA also concludes that the public interest prong of the required suspension analysis does not reveal any basis for disrupting the new acquisition.

The chief reason for these findings is the Protester's failure to effectively rebut the facts and arguments set forth in the TSA's Opposition to the suspension request. While KCI filed a Reply to TSA's Opposition that referred to the fourteen protest allegations set forth therein as the Protester's "reasons" warranting a suspension, beyond articulating why it found various terms of the new solicitation objectionable, KCI provided no actual discussion or rationale in support of the suspension itself.

Under the circumstances presented here, there is no basis for finding irreparable injury will result if the Protester's suspension is denied. It is well established that protest allegations which simply emphasize why particular solicitation terms are objectionable do not establish irreparable injury. *See Decision on Protester's Request for Stay of Contract Performance, Protest of All Weather, Inc.*, ODRA 04-ODRA-00294. Accepting such allegations as demonstrating irreparable injury would be inconsistent with the AMS presumption that acquisition activities will continue during the pendency of bid protests absent a showing of compelling reasons. *Id.* Nor is there any evidence to support a conclusion that the relative hardships of the parties warrant a stay.

As indicated above, the "principal purpose" of the solicitation—and these services—is to ensure airline and hotel reservations for Federal Air Marshals on official mission status, and to support the FAMS efforts to promote confidence in the United States civil aviation system through effective deployment of Federal Air Marshals on American aircraft. *See TSA Opposition, Declaration of John M. Muth*, at 1. TSA further asserts that any "[s]uspension would place the FAMS program at risk and jeopardize the national security of the United States." *See TSA Opposition*, at 5. Notably, where a solicitation requirement directly relates to national defense and/or human safety, as is the case here, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible level of reliability and effectiveness. *See Protest of Northrop Grumman v. FAA and Sensis Corporation*, ODRA Docket No. 00-ODRA-00159. As explained by TSA, the experience, security clearance, quality control and other requirements of the new solicitation which are the subject of KCI's current protest are necessary to ensure the safety and security of the FAMS mission, and safeguard both its federal and contracting personnel.

The ODRA finds that the public interest in aircraft security strongly supports a continuation of the acquisition process during the pendency of the KCI Protest. The TSA has sufficiently identified and emphasized the critical nature of the required reservation support services—and it is apparent from this record that many of the challenged solicitation terms are designed to strengthen the public’s confidence and facilitate the FAMS mission to keep air transportation secure.

V. CONCLUSION

For the foregoing reasons, the ODRA concludes that there are no compelling reasons to stay the acquisition process during the pendency of this Protest. The ODRA therefore denies the Protester’s request for a stay.

Behn M. Kelly
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APPROVED:

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Anthony N. Palladino
Director
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April 21, 2006